83-1627

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARSHALL P. SAFIR,
Petitioner,

v.

ELIZABETH H. DOLE
in her representative capacity as
Secretary of Transportation,
Federal Respondent
and
LYKES BROS. STEAMSHIP CO. INC.
UNITED STATES LINES INC.
AMERICAN PRESIDENT LINES LTD.
FARRELL LINES INC.
MOORE McCORMACK LINES INC.
PRUDENTIAL LINES INC.
PRUDENTIAL-GRACE LINES INC.
Carrier Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marshall P. Safir
271 Grand Central Parkway
Floral Park, NY 11005
212-225-0210

March 30, 1984

QUESTIONS PRESENTED

When Congress declared that a violation of Section 810 of the Merchant Marine Act of 1936 was a voidance of contract did Congress intend that private suits for restitution claims would be available for a party who succeeded in obtaining a judgment as to liability therefor.

Whether the use of mootness as a jurisdictional device to vacate a valid judgment relied upon for two years was inconsistent with the cognizable personal stake in the recovery of unjust enrichment from the violators.

Whether Congress in the Ocean Shipping Act of 1984 intended by its Savings Provision in Sec. 20(e)(2)(A) and (B) to endorse the contemporary legal context of implied causes of action for this petitioner as a member of a benefited class.

LIST OF PARTIES

This petition is being filed on behalf of Marshall P. Safir. The respondents are the Secretary and the *Carrier*s listed below.

Lykes Bros. Steamship Co. Inc., formerly a subsidiary of LTV Corp.

American President Lines Ltd., formerly a subsidiary of Natomas Corp. which parent has now merged with Diamond Shamrock Corp.

Moore McCormack Lines Inc., formerly a subsidiary of Moore McCormack Resources.

United States Lines Inc., a subsidiary of McLean Industries Inc.

Farrell Lines Inc. with whom American Export Lines Inc. was merged in 1978.

Prudential Lines Inc.

Prudential-Grace Lines Inc.

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"Rethinking Standing" 72 California Law Review 68 (1984)

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H.R. Conference Report 98-600 98th Congress Second Session Shipping Act of 1984 to accompany S-47 Feb. 23, 1984

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OPINIONS BELOW

The opinion in Safir v. Dole and other appeals consolidated therewith is dated September 30, 1983 and cited at 718 F2D 475 (DC Cir 1983) (Dole I). Rehearing en banc was denied on Nov. 4, 1983. See A 1-19, 22-24. The District Court decision from which these appeals were taken is cited as *Safir v. Klutznick* 526 F. Supp 921 (DDC 1981). The order of dismissal in *Safir v. Dole and Lykes* of Nov. 28, 1983 is unreported but is in the appendix 27-28. The denial of rehearing of Dole II on January 10, 1984 is also unreported but appended A 20 to A 21. The memorandum opinion and order of July 12, 1983 of the District Court below in Dole II is unreported but reprinted in the appendix at pages 38 to 46. There are four closely related decisions by the Bankruptcy Court. They are dismissals of involuntary petitions against certain of the violators - a typical one Lykes is appended A 34-37, A-25 ... The Court of Appeals had consolidated all the appeals on the merits with the exception of Docket 82-1064 an appeal for WSPF discovery which was dismissed on Oct. 5, 1983. See Appendix p. 32.

The history of the litigation is reported in *Safir v. Gibson* 417 F2D 972 (2nd Cir. 1969) Safir I *Safir v Gibson* 432 F2D 137, 145 (2nd Cir) cert denied subnom *American Export et al v. Safir et al* 400 US 942 (1970) (Safir II) *Safir v Blackwell* 469 F2D 1061 (2nd Cir 1972) Safir III *Safir v. Kreps* 551 F2D 445 (DC Cir) cert denied 434 US 820 (1977) Safir IV *US ex rel Safir & Safir v. American Export et al* 579 F2D 747 cert denied 441 US 942 (1978) Safir V.

A petition for certiorari was taken from the government dismissal from the appeal in *Lewis v. Safir* 81-2393. See *Safir v. Lewis* petition 82-506 cert denied 103 S.Ct. 303 rehearing denied 103 S.Ct. 773.

JURISDICTION

This petition is being filed pursuant to an extension of time granted by the Chief Justice to April 2, 1984. The Court's jurisdiciton is invoked under Title 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, Section 9 U.S. Constitution Clause 3

"No Bill of Attainder or *ex post facto* Law shall be passed."

Title 46 U.S.C. §1227

It shall be unlawful for any contractor receiving an operating differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert wit another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefore in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. June 29, 1936, c. 858 §810, 49 Stat. 2015.

STATEMENT OF THE CASE

This Petition is one that serves as another example of the truth of the statement by Justice Rehnquist in *Valley Forge Christian College v. Americans United for Separation of Church and State* 454 US 464 when he said that "the concept of Article III standing has not been defined with complete consistency."

The petition stems from three decisions of the Court of Appeals for the DC Circuit all of which dismissed appeals by this petitioner Safir for lack of jurisdiction (Mootness). The first was *Safir v. Dole* 718 F.2d 475 (DC Cir 1983) (Dole I) vacating a district court judgment under the Mootness-standing doctrine and the second was a summary affirmance of a district court decision (Joyce Hens Green J.) which denied standing on grounds that Safir was not a judgment creditor with a personal stake in an administrative action approving a leveraged buy-out of a ship line which approval was required under a federal statute 46 USC §1178. The third was an appeal of a motion to quash which had been granted by the District Court (Bryant, J.) to the government against discovery of certain Watergate Special Prosecutor Force records of an alleged conspiracy.

The Court below held that the three related decisions had their root in the new teachings of this Court under Article III in "Valley Forge" pp. 473-474 in a prudential separation of powers context. Standing could now take into account a number of interests traditionally considered irrelevant to the

standing determination. See "Rethinking Standing" 72 Cal L.R. 68 (1984).

In that context the Dole I court construed Sec. 810 of the Merchant Marine Act 1936 (46 USC §1227) in which Congress stated "No payment or subsidy of any kind shall be paid directly or indirectly .... to any contractor or who shall violate this section - as permitting the executive agency discretion to refuse to impose upon the violators, "the added cost of 'foregoing' and 'returning' government subsidies," at the behest of a party with standing to compel termination of subsidy contract and recovery of those subsidies the Second Circuit in Safir I had determined were a burden which had been illegally imposed on him. This standing to compel this action had been reaffirmed in the D.C. Circuit in *Safir v. Kreps*, supra (1977).

The Dole I court then affirmed the finding of the Secretary of Commerce in 1974 that the statute had been violated and affirmed retroactive subsidy recovery relating to the period of violation; then vacated the 1981 judgment of the District Court in *Safir v. Klutznick* supra citing *U.S. v. Munsingwear* 340 U.S. 36, 39 (1950). The affirmation of violation and recovery dismissed on the merits the complaints of the violators which had been consolidated with this petitioner's.

The actions for Mandamus under 28 USC 1361 first filed in the Second Circuit for mandatory cessation of payments by the Maritime administration were dissolved into Administrative Procedure Act jurisdiction contoured by Judge Friendly in Safir I (1969).

The formula the Court outlined was one not confined to the treble damage clause of sec. 810 but to a theory of recovery by which the government's duty to the plaintiff could be other-

wise accommodated. For this purpose Judge Friendly cited *Phelps Dodge v. NLRB* 313 US 177, 197 (1941) as a guide. He equated the government's obligation to Safir as one analogous to a rein-statement with back pay using the subsidies thus disgorged for the equitable result the court intended. *(Porter v Warner* 328 US 395, 400 (1945). More recently *US v. Exxon* 561 F. Supp. 816 (DDC 1983), also *Sauder v. Doe* 648 F2D 1341 (TECA 1982).

Discretion was thus granted, once a finding of violation had been made to pay recoveries to Safir under restitution doctrine to avoid contract voidness and injunctive relief for recission and restitution. The issue of whether the statute which has a voidance clause in Sec. 810 implied statutory right of action was not addressed. Instead Judge Friendly foresaw a statutory obligation on the government enforceable by a federal agency in the public interest for the benefit of private parties. See *Nathanson v. N.L.R.B.* 344 U.S. 25 (1952) wherein the United was considered a creditor acting for individuals.

The decisions in Dole I and Dole II maintain that this petitioner no longer meets the criteria uniquely contoured to a requirement of competitive potentiality in the DC Circuit's refinement of the Second Circuit's standing decision in Safir I. *Safir v. Kreps* supra (1977). The remand to the District Court required a four year review culminating in *Safir v. Klutznick* supra where Safir's "competitive potential" was specifically reaffirmed by the District Court on a Rule 60(b) motion after judgment. The violators had sedulously abstained before judgment from raising it. See Safir v. Gibson (Safir II 1970) at p. 145. Also *Baumer v. United States* 685 F2D 1318, 1321 [11th Cir. 1982].)

The Court in Dole I heard oral argument on Oct. 29, 1982 and since that date a spate of major changes in ownership of

the violating ship lines have occurred under circumstances which establish a pattern indicative of what was formerly called the first act of bankruptcy - fraudulent conveyance, now Title 11 USC §548 under the "Code".

Leveraged buyouts of the stock of two of the violators 1) Lykes Bros Steamship Co Inc. sold by LTV Corp. to members of the Lykes family (who were themselves major stockholders of LTV) using the proceeds of the mortgaging of Lykes Lines assets for purchase money payments to LTV Corp. and 2) the sale of Moore McCormick Lines Inc. by its parent Moore McCormick Resources Inc. to McLean Industries Inc. (owner of US Lines, another violator) on a similar basis.

In addition 3) the sale of Delta Steamship Lines by Holiday Inns Inc. to Crowley Maritime Corp. where certain Delta ships were formerly owned by the Grace Lines, a violator subject to recoveries; 4) the merger of Diamond Shamrock Corp. with Natomas Corp. and the simultaneous spinoff of American President Lines Ltd., another violator thereby separating the merged entity from its former troubled subsidiary. 5) The partial liquidation of the assets of Farrell-American Export Lines Inc. to satisfy preferred creditors prior to execution of a money judgment anticipated by the Safir litigation.

All of this activity took place within a 12 month period immediately before and soon after Oct. 29, 1982. Petitioner had ample reason to believe that the transfers were effected to minimize the value of the "Klutznick" judgment, upon its affirmation in the Dole I decision then subjudice, where liability had already been determined and where only the amount of recovery was unliquidated.

The decision in Dole I to vacate "Klutznick" was unusual but when examined in light of subsequent events was "less than meets the eye." The effect was to substitute and affirm the administrative finding of liability and retroactive recovery in 1974 for the District Court affirmation (with its own dicta) in *Safir v Klutznick* supra.

The intent to ignore the anomaly of affirmation of the *res judicata* effect of this substitution under mootness doctrine was manifest in the rejection of a motion for summary reversal of Judge Green's decision in *Safir v. Dole and Lykes* by Dole II wherein Safir had pointed specifically to the effect of the substitution. One panel of the court held that his entitlement was merely "not so clear." A second panel granted summary affirmance to the Secretary.

The Dole II Court had before it on rehearing therefore, the issue whether vacation of the Klutznick judgment and the extinguishment of Safir's standing under the Administrative Procedure Act 5 USC §702 in the sec. 810 litigation Dole I had an effect on the private litigation he had filed in the bankruptcy court or the new APA litigation under sec. 608 of the MMA 36 (46 USC §1178) on the basis of the now valid substituted judgment of liability for termination of contract and retroactive recovery of the unjust enrichment of the violators.

The Court declined to address the validity of the judgment it had affirmed, for second causes of action, because by so doing it would destroy the foundation of its arcane finding of mootness pending appeal.

Regardless of the decisional inconsistency, the Court of Appeals that had, by Dole I been "tempted and succombed to holding the case moot when the substantive issues were so troublesome" - See Mootness in the Supreme Court 88 Harvard L.R. 373, 375 - was now constrained to reject as well

the relevance of recent decisions of the Supreme Court on implied right of private action collateral to findings of liability for voidness of contracts under federal statutes. This was pointed to in the petition for rehearing in Dole II which crystalized the issues which form the basis for this petition when rehearing en banc was denied in Dole II on January 10, 1984.

DOLE I

Dole I held that redressability for the injury to Safir in the law of the case in Safir I and reaffirmed in *Safir v. Kreps* supra could no longer be sustained by the passage of time.

This finding of mootness pending appeal from the judgment of the district judge who 18 months earlier had taken the opposite view, was based on a different interpretation in the D.C. Circuit than that of the Second Circuit as to the definition of victim in this case. The Second Circuit made no distinction between the standing of the victim who expressed a desire to reenter competition from one who had "washed his hands of the business" *Safir v. Gibson* I (1969) at p. 977. The D.C. Circuit narrowed the standing of victim, to a "competitive potential" standard with the natural implication of extinguishment at death of the victim or evidence of retirement, proof of senility, etc. would terminate his personal interest or that of his heirs in redress of financial injury.

Recognizing the danger inherent in such an interpretation, the court in *Safir v. Kreps* supra p. 451 carefully admonished the reluctant Secretary against such further delay in performing his duty to the plaintiff. The Court rejected this new attack on standing this by stating:

> Moreover, for us to hold today that the Secretary of Commerce can divest a person in appellant's position of standing simply by *foot-dragging* would scarcely serve the interests of Congress or the Constitution. After all, the Secretary's initial and allegedly continuing *unwillingness to protect Safir's interests may well be a contributing factor to Safir's inability to re-enter the shipping business* - certainly Congress (in the Second Circuit's view) thought that *prompt termination and recovery of subsidies would be of material assistance to the victim of predation.* Nor do we see how any Article III purpose would be served by refusing Safir a forum in which he might contest the adequacy of the Secretary's compliance with an unquestionably valid order of the Second Circuit, especially where the only apparent ground for such refusal would be delay caused *by the very dilatoriness of the Secretary* and the Administrator which led to the initial suit. For all of the above reasons, therefore, *we decline to hold that the passage of time has removed appellant's standing to prosecute this action.*
>
> (emphasis added)

The Kreps Court had cited *Simon v. Eastern Kentucky Welfare Rights Org.* 426 US 26 as the basis for his standing to profit from the Secretary's proper compliance with the Second Circuit order. During the ensuing six years the Secretary did nothing other than to protect, before the District Court on remand, his refusal to terminate the subsidy contracts of the carriers he found in 1974 to have violated the Act.

Upon the determination in *Safir v. Klutznick* supra that the actions of the Secretary and his Maritime Subsidy Board were

abuses of discretion, the secretary (Lewis) appealed but later moved to dismiss that appeal. The Court of Appeals granted the motion and stated "no costs will be taxed."

This petitioner then filed for certiorari on the issue of whether a *damage* remedy existed against the sovereign under the unique wording of the statute 810 and whether costs and attorney's fees were recoverable to the prevailing party. This was the basis of Petition No. 82-506 filed September 22, 1982 before oral argument in Dole I.

In that petition, however, and while the remaining consolidated appeals from the "Klutznick" judgment were subjudice, this petitioner stated the failure of the Secretary to terminate subsidy had an exclusionary effect on Safir's competitive reentry and a continuing attritive effect on his business and property. Safir stated further that the injury to his competitive potential was based on the refusal to terminate the contracts. See *Safir v. Lewis* petition No. 82-506 pp. 11-14. Copies of the petition were requested by the panel during the oral argument in *Safir v. Lewis* on Oct. 29, 1982 which resulted in the Dole I decision.

The unequivocal wording of the statute as to voidance upon finding of violation and the injunctive relief necessary was not only ignored but this petitioner was, by the decision in Dole I, criticized with "his record of non-participation in the shipping business" while the government was insuring his exclusion! The unlikelihood that the law would be upheld destroyed the credibility of his competitive potential.

The "likelihood of his benefiting from the order which he seeks" was twofold - either recovery of the funds by the government in his behalf or a collateral private cause of action for voidance against the contractor. Both Circuits had already granted standing on the grounds that Safir had the right

to seek a voidance of contract. See *Deckert v. Independence Corp.* 311 US 282, 288 (1940). Safir resorted to the court then to have those contract rescinded but, contrary to the holding in "Deckert" the court declined. "Deckert" also held that a valid judgment as to its liability" implies the power to make effective the right of recovery afforded by the Act." See also *Mills v Electric Autolite* 396 US 375, 378.

This dilemma was before the Dole I court confronted by the valid judgment of the District Court which had reaffirmed its own jurisdiction when a 60(b) motion under F.R.C.P. attacked Safir's "competitive potential" in 1981. The District Court upheld its jurisdiction in denying the motion.

The dilemma was compounded by the decision of this Court in *Transamerica Mortgage Advisors v. Lewis* (TAMA) 444 US 11, 18-19 (1979) which stated that when Congress declared that certain contracts are void - and "No payment or subsidy of any kind..." is a voidance of contract; - it intended "the customary legal incidents of voidness would follow including the availability of a private suit for rescission or for injunction against continued operation of the contract and for restitution." TAMA supra p. 19.

Moreover, prior to TAMA, the Second Circuit in Safir I (1969) declared this redressability available to the victim by government aid to him in the context of that which was equitably authorized in *Phelps Dodge v NLRB* 313 US 177, 197 (1941); also *Porter v. Warner* supra p. 400 citing "Phelps Dodge."

Petitioner's causes of action in the District Court in *"Dole-Lykes"* and in Bankruptcy Court in In Re Lykes, Farrell, American President Lines and Moore McCormack were, in the words of Chief Justice Burger in *Deposit Guarantee Na-*

tional Bank v. Roper 445 US 326, 339-340 (1980), "an evolutionary response to the existence of injuries unremedied by the regulatory action of government."

VACATION OF JUDGMENT

The action of the Court in vacating the judgment below, based on the fiction of the mootness of Safir's competitive potential, stands the teaching of *U.S. v. Munsingwear* 340 US 36 (1950) on its head. Contrary to the predicament of the petitioner United States in that action where the issue below had been determined against the government and the government had slept on its appellate rights, the *Safir v. Klutznick* judgment was not a matter determined against Safir - he was identified by the district court as the prevailing plaintiff. Cf. Wright & Miller F.P. & P. Sec. 3533 p. 293.

The merits panel in the Sept. 30 order did not modify the judgment, therefore there were no grounds to vacate it. Instead the merits panel, to the contrary, has found that the issues determined against the lines in the lower court, were *res judicata* and the retroactive effect of the violation on recoveries had been determined as the law of the case having been decided in the second circuit so long ago as to work an estoppel here.

Relief from judgment, grounded on the jurisdictional fiction of the mootness of Safir's potential found *after* the judgment in this contested action should have been denied in order to protect a justifiable interest of reliance on that judgment. This is clearly set forth in U.S. v. Munsingwear supra p. 38 citing the rule of *res judicata* in *Southern Pacific Railroad Company v. U.S.* 168 US 1, 48-49. See also Restatement of Judgments *Second* Sec. 69, p. 178.

There was no violation of authority by the lower court and no warning given by this court that the judgment might lack validity without a reasonable inquiry into whether Safir's competitive potential had post-judgment, become unlikely. Such a warning should have militated against Safir's reliance on it in the bankruptcy court in the petitions filed against certain of the Sec. 810 violators, before Judge Green in DC DC 83-0688, and before this motions panel on appeal.

At worst, if this petitioner were to assume, *arguendo*, that he became competitively "hors de combat" during the appeal, the rigors of *res judicata* cannot be alleviated in favor of the violators by vacation of judgment *U.S. v. Minsingwear* supra p. 39. On the subject matter - liability for disgorgement - none of the exceptions to the finality of the distict court's jurisdictional determination was present.

Vacation of the judgment that made Safir a judgment creditor cannot thus be sustained.

"The principles of *res judicata* apply to questions of jurisdiction as well as other issues" *Underwriters Assurance Co. v. North Carolina Life Ins. Co.* 455 US 591, 706-707 reaffirming *Durfee v. Duke* 375 US 106 (1963) and *American Surety v. Baldwin* 287 US 156, 166 (1932)

There was no violation of authority by the lower court, the judgment was *res judicata* and conclusive as to many holdings that were not addressed in the Secretary's judgment of 1974.

Safir did not receive all that he had sought and this Court had recently held that it is within a party's privileges

> "to appeal from those adverse rulings collateral to the judgment on the merits at the behest of that party who

has prevailed on the merits so long as the party retains a stake in the appeal satisfying the requirements of Article III."
Deposit Guarantee v. Roper supra p. 336 citing *Electrical Fittings v. Thomas and Betts* 307 US 241, 242 (1939)

Judge Bryant had designated Safir as the prevailing plaintiff, see *Safir v. Klutznick* supra p. 941 in the appeals from the 1974 administrative order which the Court *had consolidated for all purposes.* Safir was the prevailing appellee with the Secretary on the violators appeal from liability and recovery on the merits in Dole I.

The "Klutznick" judgment had reassessed the culpability of the so-called "non-trade" lines in the conspiracy from that of a "technical" violation to that of knowing wrongdoers. The Klutznick judgment also held that Construction Differential Subsidy recovery was mandatory whereas the Secretarial judgment of 1974 confined the recoveries to operating differential subsidies only ($1 million). These holdings were hard-earned assets to the prevailing plaintiff. Nevertheless the Klutznick judgment directed neither rescission-injunction, nor restitution in the "Friendly" concept but instead another wearisome remand to the Secretary with suggested guidelines in recovery analogous to the recommendation of a hearing examiner in 1972 as to operating differential subsidy disgorgement as a penalty.

The Secretary of Transportation Lewis did indeed follow the guidelines (for ODS only) demanding $10 million in recovery for the account of the agency as a refund as a penalty.

This order was then abated by the vacation of the Klutznick judgment in Dole I and it is fair to state, in the present disarray, "that interim relief and events" have done nothing

to "completely and irrevocably eradicate the effects of the alleged violation" which is one test of mootness recently reaffirmed by this Court in *County of Los Angeles v. Davis* 440 US 625, 631 (1978) citing with some irony to this petitioner *De Funis v. Odegaard* 416 US 312 (1974).

In *Powell v McCormack* 395 US 486, 496-500 (1969) this Court held that when one of several issues become moot the remaining live issues supply the constitutional requirement of a case or controversy. The liability and retroactive disgorgement issues are now res judicata and in the past - the past is prologue to the remaining live issues.

Justice Powell in dissent in "Davis" pp. 643-644 note 9 compared "Davis" with "De Funis" with the clarity this petitioner can only hope to emulate. The Court of Appeals cited *Golden v. Zwickler* 394 US 103 (1968) and *De Funis v. Odegaard* supra as analogous to loss of immediacy of Safir's position during the two years of its deliberations of the appeal. These citations overlook *inter alia* the key fact that distinguished this petitioner from them. There was *hard evidence* that the passage of time had indeed altered those plaintiffs' condition - De Funis was in his final year of law school when the case as to admission practices was reached by the Supreme Court. This was a hard fact subject to incontrovertible proof.

In *Golden v. Zwickler* supra the court found the facts that the target ex-Congressman by accepting a 14 year term as a judge would no longer be a candidate for Congress. In each case there was no basis for conjecture. The issue of "desire" to become a lawyer, or to become a judge no longer had sufficient immediacy and reality because their objectives had been

attained and the constitutional issues that their former status engendered no longer existed at the state of appellate review. In contrast the desire for re-entry into business by this petitioner has not been fulfilled in spite of the reasonable expectations that the judgment and the law of the case engendered. Unlike De Funis and *Golden v. Zwickler* supra, the factual matrix of this petitioner has not changed. He has neither washed his hands of the business nor applied for social security.

In the Safir case as in *Roe v. Wade* 410 113, 125 the pregnancy of a Brandeisian re-entry into competition is a significant fact in the litigation. The 20 year gestation period should not be terminated by fiat in the 19th year.

The full-time devotion to the struggle for vindication and re-entry into the shipping industry had not so changed the character of the petitioner from a shipping competitor to a paralegal as to make a career in the law more likely or more desirable than one in shipping in his declining years. There may be reason to believe that this is met with some relief in the legal profession.

Furthermore, to satisfy "the heavy burden" of demonstrating mootness; see *United States v. W.T. Grant* 345 U.S. 629, 632-633 (1953), and since mootness was not the subject of briefing by any of the parties; see *Foley v. Blair* 414 US 212, 217 (1973), the court pointed to no more than one statement (at oral argument) that Safir's preferred remedy of a governmental recovery in his behalf was not likely to be achieved.

Based on the interest shown by the panel at oral argument in receiving copies of the petition for certoriari in *Safir v. Lewis*

No. 82-506 which had been filed 5 weeks earlier, Sept. 22, 1982 it was clear that a live controversy existed outside that courtroom which more than met the personal stake criteria to defeat mootness of *United States Parole Comm. v. Geraghty* 445 US 388, 395-408 (1979). The personal stake met the more demanding standard of *Deposit National Bank v. Roper* supra 337, 338 wherein the stake of costs and attorneys fees as one of the collateral causes of action in "Roper" was sufficient to maintain the Article III requirement of case or controversy. Chief Justice Burger went further to acknowledge and concur in the holding of *Electric Fitting v. Thomas and Betts* supra.

> "In Electric Fittings the petitioners' concern that their success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estopped application of the District Court's ruling [on patent validity]. This concern supplied the personal stake in the appeal required by Article III."

Petitioner Safir shares the same concerns. His future litigation is not unspecified however, it is explicitly stated as a claim for restitution from the violators. He has acted as any judgment claimant would act to protect the profit afforded by his personal stake. The claim for restitution is not against the United States as both the District Court (Green, J) and the Bankruptcy Court (Whelan, B.J.) have hypothesized. This Court in *Safir v. Lewis* cert. denied 103 S. Ct. 773 has indicated that damages and costs will not lie in that direction.

No statutory base exists for repayment to the United States of public monies previously paid during the period of the violation or for that matter public monies paid since that time to the present day if termination of these contracts is found by this court to be mandatory based on the words of the statute.

No contract suit has ever been filed against the violators for recovery. The Secretary rejected recoveries by the agency as compensation to Safir in spite of the holding of Safir I and Safir IV that this was in compliance with the regulatory scheme. The Court of Appeals in *Safir v. Dole I* has reversed the basis of its earlier premise in Safir IV that Safir stood to "profit" from agency action and now look bleakly at that prospect. This is contrary to the holding in *Bulzan v. Atlantic Richfield* 620 F2D 278, 282 (TECA 1980) which held that "This compensation is a by product of the agency's effort to reestablish compliance with its regulatory scheme." It would be compensation "to restore the victim to a position where he would have been had it not been for the unlawful violation" or to disgorge ill-gotten gains - or accomplish both objectives" See *Sauder v. Doe* 648 F2D 1341 (TECA 1981) quoting 5 Moore Federal Practice and Procedure Sec. 38.24(2), 38-195 (2nd Edition 1981).

Curiously, the suggestion to the violators that they "purchase the resignation of this 'private attorney general' " rather than continue the litigation, see Dole I at p. 480 raises the question as to the need for such purchase if no stake remained to sell. Justice Rehnquist in his concurrance in "Roper" p. 342 based liveness of that case on the unaccepted nature of the offer made as saving "liveness" from prejudicial effect. Presumably on this account the violators knew better than to try.

DOLE II

The flexible contour of standing in Valley Forge may stretch to the arguable prudence of letting aging allegations of political mischief lie. See Pet. 82-506 p. 8 *Safir v. Lewis* supra, but

the flexible contour should not stretch to smother an old fashioned personal stake, *Franks v. Bowman Transportation* 424 US 747, 755 (1976) by taking into account a variety of interests traditionally considered irrelevant to the standing determination.

> "When the Constitution makes clear that a particular person is to be protected from a particular form of government action that person has the "right" to be free of that action; when that right is infringed then there is injury, and a personal stake within the meaning of Article III."
> Justice Brennan dissenting Valley forge p. 493 as quoted in "Rethinking Standing" Cal. L.J. 72:68 p. 92 (1984).

In the complaint in *Safir v Dole and Lykes* (Dole II) that governmental action was a Secretarial waiver to permit an alleged fraudulent conveyance of assets petitioner claimed were subject to constructive trust. See Palmer "Law of Restitution" pp. 182-183 also Constructive Trust, Restatement of Restitution Second Sec. 160. All of the basic tests for standing under "Valley Forge" were met in Dole II.

1. The regulatory scheme has been discussed earlier in relation to both a restitutionary remedy (and/or a treble damage remedy) under 46 USC §1227. Nothing in Dole I rejected Judge Friendly's construction of the statute in regard to any victims standing to pursue further relief consistent with that scheme on conclusion of judicial affirmation that the victim met the criteria to require such finding.

2. The Article III elements set forth in "Valley Forge" supra p. 471 were satisfied as follows:

a. Injury in Fact. Petitioner alleged in the complaint that the Secretary's approval of the leveraged buy-out of the violator Lykes for the benefit of generating cash for its divesting parent LTV Corp. was a deliberate scheme to reduce the net asset value of the Lykes subsidiary that would be available for disgorgement of the total unjust enrichment. The district court must assume the uncontroverted allegation to be true. Petitioner further alleged that the defendant Secretary had, as a condition of approval of transfer, garnered a secured mortgage on a vessel that was otherwise unencumbered to the detriment of the monetary interest of this claimant.

b. The injury is therefore traceable to the challenged approvals under Sec. 608 of the MMA '36 (46 US §1178). The agency's approval afforded the fleeing LTV Corp. the opportunity to strip the assets of the line.[1]

c. A favorable decision rescinding approval and return to the status quo ante would redress the injury and preclude the necessity of continuing to act to protect the claim in a bankruptcy forum under the fraudulent conveyance - first act of bankruptcy theory (11 USC §548) - wherein the controversy is essentially between the single petitioning claimant and general creditors of the insolvents. The claimant would be required to establish his right to petition under the single creditor petition exception to 11 USC §303 of the "Code" based on grounds that his restitution claim under constructive trust impose a priority in bankruptcy over all general creditors including tax liens of the United States see *Atlas v United States* 459 F. Supp 1000, 1004-1005 (DND 1978) also *In re Kountze*

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[1]LTV and Republic Steel Co. have agreed to a merger. The Dept. of Justice has given conditional approval. There has been no disclosure under SEC Rule 10 b-5 of the LTV-Lykes liability for disgorgement of more than $100,000,000 to the Petitioner's knowledge as of the date of this petition. See "Tracing" Cornell Law Review Vol. 68:172, 1983.

Bros. 79 F2D 98 (2nd Cir 1935 Learned Hand, J) cert denied 296 US 640 (1935) as cited in Palmer - Law of Restitution Sec. 2.14 pp. 182-184.

Relief in a non-bankruptcy forum would provide an assured priority of payment over a period of time from a debt or with no requirement for the recipient to take peremptory action in a bankruptcy forum which is less advantageous to him. See *Brown v. Felsen* 442 US 127, 138 on Justice Blackmun's Shakespearean explanation of the dilemma at note 8.

Causation and redressability are thus articulated.

3. Prudential Considerations - the D.C. Circuit has within the last year explained "Valley Forge" in *Community Nutrition v. Block* 698 F2D 1239 (1983) and based on that decision petitioner's standing should have been heart warming to the dissentor therein as it should now be clear that this is not the generalized grievance of the "private attorney general" as Judge Scalia characterized the appellant in Dole I. It is the standing, instead, of a uniquely identifiable individual whose direct monetary pursuit has none of the weaknesses the dissentor found so objectionable in "Community Nutrition." This petitioner wishes to make perfectly clear that the governmental mischief whose effect he challenged in *Safir v. Dole and Lykes* (Dole II) were not those widely distributed but whose effects are singularly directed against him.

Therefore "Valley Forge" was itself misconstrued as to access standing but was "splinted" within the shaky context of the misapplied mootness doctrine in Dole I *to avoid the requirement to address the implied right of action for the secondary restitution claims on the merits.* The jurisdictional decision in Dole I was deprived of any principled content and it

led to an unpredictable result. See "Mootness in the Supreme Court" 88 Harvard L.R. 373, 375 n. 113 (1974).

That unpredictable result was the requirement in Dole II on the petition for rehearing to deny access standing by rejecting the petitioner's contention that an implied collateral private right of action for restitution existed for a violation of sec. 810 MMA '36 (46 USC §1227). The bottom line of the substitution of the Secretarial judgment affirmed by the Court of Appeals for the "Klutznick" judgment of the District Court is that the controversy "lives."

REASONS FOR GRANTING THE WRIT

Although this litigation has been before this Court on several occasions the Supreme Court has not until now been requested to determine whether Sec. 810 of the Merchant Marine Act '36 implies a private right to a claim for equitable relief against the violators, some of whom had already been determined to have violated the ACT as early as 1970. See Petition for Cert. 70-670 *American Export Isbrandtsen Lines Inc. et al v. Marshall P. Safir et al.* cert. denied 400 US 942 (1970).

The decision of this court in *Transamerica Mortgage Advisors v. Lewis* (TAMA) supra pp. 18-19 is the foundation of this petitioner's private claim under the statute now that the last vestiges of appeals by the violators of the finding of violation of all who acted in concerted predatory fashion are res judicata and retroactive recovery is established. The federal agency charged with the responsibility for administering the Act has already recovered, for its own account, a small fraction of the full disgorgement attainable under restitutionary law.

This Court in "TAMA" held that such private remedy may be implied where the statutory language itself implies a right to relief in a federal court.

> "By declaring certain contracts void...by its terms necessarily contemplates that the issue of VOIDNESS may be litigated somewhere....A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid. See *Deckert v. Independence Corp.* 311 US 282, 289....We conclude that when Congress declared in [sec. 215] that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an in junction against continued operation of the contract, and for restitution. Accordingly we hold that...[the respondent] may maintain an action...."

Section 810 is composed of two paragraphs each of which compare with Section 206 of the Investment Advisors Act (in the first paragraph) and Section 215 of the Investment Advisors Act (in the second).

The first paragraph of sec. 810, like sec. 206 proscribes conduct which makes it unlawful to engage in practices etc...See TAMA pp. 16-17 note 6 and compare sec. 810 in kind.

The second paragraph of sec. 810, like sec. 215 provides an implicit right to relief in its first sentence "No payment or subsidy of any kind *shall* be paid...." as explained by Justice Stewart in TAMA as to voidness in the language of the section; see TAMA p. 17 note 7 and compare 810 in kind. "No payment" means voidness.

The fact that Sec. 810 also contains an explicit damage remedy as well was addressed by Judge Friendly in Safir I, p. 978 footnote 8.

> "The government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which §810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States."[2]

The violation of §810 meets the requirements explained in *Cort v. Ash* 422 US 66 (1975) and reaffirmed in *California v. Sierra Club* 451 US 287, 293 (1980) where the Court listed its preferred approach to relevant considerations. The "Cort" test is met by this petitioner as follows:

1) The statute 810 creates a federal right in favor of the plaintiff as 15 years of standing to prosecute the action and compel compliance with its clear meaning was granted in two federal circuits. Safir I at p. 977 and *Safir v. Kreps* at p. 451. The plaintiff was seen by the congress, in the Court's opi-

[2]An antitrust case was settled by the trustee in Bankruptcy for Sapphire SS Lines in 1973. This petitioner, contrary to the statement in Dole I on page 477, received no compensation therefrom. All the proceeds went to the fees of the trustee and his counsel and the creditors of the bankrupt who received or will receive 100% of their claims.

nion is as an "especial beneficiary" of the statutory scheme. Cf. *Texas Industries v. Radcliff Metals* 451 US 630, 639 (1981). More clearly then anywhere else this characterization would tie the only litigation under this statute in the last 15 years to this plaintiff as a benefited class of one.

2) The second "Cort" test as to legislative intent "to create such a remedy or deny one" is graphically clear in the recent reassessment by Congress of maritime regulatory policy. The Court in *Merrill Lynch v. Curran* 456 US 353, 386-388 (1981) found that private actions would lie if they were in the "Contemporary legal context." In this case the ink is not dry on the President's signature on the Shipping Act of 1984 wherein Congress affirmatively preserved new claims for past misconduct for twelve months from enactment.

The answer cannot rest on just that statement since the events of the last two years in the Congress go to the inscrutability of the mootness finding below.

The first drafts of the Shipping Act of 1982 in the 97th Congress Second Session contained language to repeal Sec. 810 as Safir v. Dole I was sub-judice in the Court of Appeals. The Senate Staff "working draft" of January 28, 1982 for S. 1593 contained the repeal under Sec. 20 of the bill. The House Version H.R.4374 under Sec. 18 "Repeals and Conforming Amendments" specified the same three sections for repeal. After the House Judiciary Committee was apprised by letter to Chairman Peter Rodino of the attainder aspects of the repealer, the repealer was removed from the bill in the House where it then passed. The bill in the Senate S1593 which maintained the repeal provision died in committee when the leadership did not elect to bring it to the floor.

When the new 98th Congress reconvened the bill was reintroduced in both houses. In the Senate version S-47 and the House version H.R.1878 the repealer of Sec. 810 had been removed. In place of the repeal however was a clause in the Senate version section 20(a)(2) the Savings Provision:

> "This act and the amendments made by it shall not affect any suit filed before the date of enactment of this act."

The House version of H.R.1878 as introduced on March 3, 1983 contained in Sec. 19(e)(2) a Savings Provision added the following words to that in the Senate bill.

> "Nor shall this Act and the amendment is made by it affect any remedy that may be available with respect to conduct engaged in before the date of enactment of the Act."

This petitioner then informed the staff members of both the Senate and House Committees charged with responsibility for the bills of the effect that either version would have on new causes of action which would ensue as the result of a decision in the Court of Appeals affecting the validity of the §810 private litigation on the restitution claims in Bankruptcy and other suits against violators who had taken no overt action which would immediately require injunctive relief for the claimant against assets dissipation pending the Dole I decision. The staff members were fully aware of their responsibility under Article I sec. 9 of the Constitution and *Davis v. Passman* 442 US 228 (1979).

The Senate version of the Ocean Shipping Act of 1983 had already passed on voice vote in May 1983 - the House language in the Savings Provision was finally resolved in the Second Session of the 98th Congress in January 1984 and it was this version to which the Senate conferees then receded and the Senate passed on Feb. 27, 1984:

Section 20(e)(2) This act and amendments made by it shall not affect any suit

A. filed before the date of enactment of this Act or

B. with respect to *claims* arising out of conduct engaged in before the date of enactment of this Act, filed within one year after the enactment of this Act.

On January 1984 this petitioner had applied for an extension of time to file this petition primarily to await the will of Congress and its intent in regard to this ongoing litigation which is the primary and definitive legal cause of significant impact on the liner segment of the merchant marine - Congress has acted by refusing to repeal 810 unless Safir's claims under it are protected.

Just as in *Merrill Lynch Pierce Fenner and Smith v. Curran* 456 US 353, 386-388 (1981) the decision in the Senate to recede to the House version of the Savings Clause provides direct evidence of Congressional intent in regard to the implied causes of action which this petitioner fought to protect pending decision in the Court of Appeals in expedition of these causes in the specific bankruptcy context or before this Supreme Court to which that court would defer for guidance pending decision on certiorari. The Court of Appeals has deferred oral argument on the bankruptcy appeals in *In re Lykes Debtor* and *In re Farrell Debtor* to a consolidated oral argument in its September 1984 sitting.

Petitioner submits that from the foregoing, it is apparent that Congress has not remained silent - it has consciously rejected an attack on Section 810 by those who stand in jeopardy of its implementation in private claims during the next twelve months.

3) Justice White's third question, "Sierra" p. 293 in the "Cort" test, whether the implied cause of action is consis-

tent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff, can best be answered by the words of Judge Friendly in Safir I (1969) supra 978 n.8.

Those public moneys are long imbedded in the earnings of the violators who were unjustly enriched thereby. The Second Circuit in Safir I characterized recovery as posing added cost on the violators. The "imposition of added costs" is a euphemism for disgorgement of unjust enrichment. This enrichment was found by the Court to be at Safir's expense. Safir's claims to the recovery are warranted to make him whole "to a position where he would have been, if not for the unlawful violation such as was practiced here." *Citronelle Mobile Gathering v. Edwards* 669 F2D 717, 722 (TECA 1982) cert. denied 103 S.Ct. 172 (1983).

The history of the violation will show that a small intercoastal carrier using four obsolete 20 year old World War II vessels replaced this Petitioner's three World War II vessel operation in the North Atlantic when the AGAFBO Conference drove his incipient container line into bankruptcy in 1966-1967. This replacement carrier was Sea-Land Service, Inc. Sea-Land is now a subsidiary of R.F. Reynolds Industries, operating 60 modern containerships under the American flag. R.J. Reynolds has recently (July 29, 1983) announced its interest in a sale of Sea-Land. On inquiry by this petitioner to the Vice Chairman of the Board of the parent, the asking price for the subsidiary was stated to be $1 billion.

The disgorgement of the subsidies paid to the violators during an eleven month period with interest from 1965-1966 represents approximately $600,000,000.

Under restitution doctrine, the central purpose is to determine the amount the wrongdoers have been unjustly enriched and then make them disgorge that amount. No proof is re-

quired that the plaintiff was damaged, much less the amount of damage.

Nevertheless, by using the Sea-Land growth model, the amount of the disgorgement roughly coincides with the equity position the plaintiff-appellant would have been able to attain had it not been for the unlawful violation. See, *Citronelle-Mobil Gathering v. Edwards*, 669 F.2D 717, 722-723 cert denied 103 S.Ct. 172 (1983).

The Safir stake therefore is dependent on an implied right of private action now that - finally - the liability issues are put to rest.

The Dole I court however, reads "Valley Forge" as license to foreclose 16 years of reasonable expectations by the petitioner - making sec. 810 a nullity.

CONCLUSION

Petitioner prays he has met the "Cort" test and that the petition will be granted.

Respectfully submitted,
Marshall P. Safir

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2271

MARSHALL P. SAFIR, APPELLANT

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

No. 81-2389

AMERICAN EXPORT LINES, INC., ET AL., APPELLANTS

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

No. 81-2394

MARSHALL P. SAFIR

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

AMERICAN PRESIDENT LINES, LTD.,
FARRELL LINES, INC.,
PRUDENTIAL LINES, INC.,
PPS STEAMSHIP CO., INC., APPELLANTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 81-2395

MARSHALL P. SAFIR

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

AMERICAN EXPORT LINES, INC.,
LYKES BROTHERS STEAMSHIP CO., INC.,
MOORE-MCCORMACK LINES, INC.,
UNITED STATES LINES, INC., APPELLANTS

No. 81-2396

AMERICAN PRESIDENT LINES, LTD., ET AL., APPELLANTS

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

No. 82-1008

MARSHALL P. SAFIR

v.

ELIZABETH HANSFORD DOLE,
SECRETARY OF TRANSPORTATION, ET AL.

AMERICAN EXPORT LINES, INC.,
LYKES BROTHERS STEAMSHIP CO., INC.,
MOORE-MCCORMACK LINES, INC.,
UNITED STATES LINES, INC., APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 74-01474, 74-01788
and 75-00077)

Argued October 29, 1982

Decided September 30, 1983

T.S.L. Perlman and *Elmer C. Maddy*, with whom *William H. Fort*, *Walter H. Lion*, *Verne W. Vance, Jr.*, and *William L. Gardner*, were on the brief for American Export Lines, Inc., et al., appellants in 81-2389, 81-2395 and 82-1008, appellees in 81-2271, 81-2394 and 82-1064.

Robert T. Basseches, with whom *Timothy K. Shuba*, *Daniel H. Margolis*, *Warren L. Lewis*, *Verne W. Vance, Jr.*, and *William L. Gardner*, were on the brief for American President Lines, Ltd., et al., appellants in 81-2394, 81-2396 and appellees in 81-2395, 82-1008 and 82-1064.

Marshall P. Safir, pro se, for appellant in 81-2271, 82-1064 and appellee in 81-2389, 81-2394, 81-2395, 81-2396 and 82-1008.

Allen van Emmerik, *Bruce G. Forrest* and *William Kanter*, Attorneys, Department of Justice, entered appearances for Elizabeth Hansford Dole, Secretary of Transportation, et al., appellants in 82-1008 and appellees in 81-2271, 81-2389, 81-2394, 81-2395, 81-2396 and 82-1064.

Before: WRIGHT and SCALIA, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SCALIA.

SCALIA, *Circuit Judge*: In these consolidated cases, appellant Marshall P. Safir, whose former shipping business (terminated in 1967) was the victim of predatory pricing by certain competing carriers, seeks to set aside

an order of the Secretary of Commerce which directs the recovery under § 810 of the Merchant Marine Act of some, but not all, subsidies paid to those carriers by the United States during the period of such unlawful activity. He appeals the district court's refusal to require the Secretary to recover all past subsidies and enjoin payment of future subsidies. We find that there is no reasonable likelihood that Safir will in the future be a competitor of these companies, whether or not their power to compete is impaired by the action requested of the government with regard to subsidies; that the relief he seeks is therefore not likely to benefit him in any legally cognizable fashion, so as to remedy the injury of which he complains; and that he thus lacks standing to pursue the present suit.

The carriers affected by the Secretary's order likewise seek to set it aside on various grounds. The lines which the Secretary ordered to return subsidies request us to find that the statute precludes any recovery of subsidies paid prior to an administrative finding of illegal activities; we hold that the doctrine of collateral estoppel bars them from litigating this issue. The lines which the Secretary found to have "technically violated" § 810 but from which he ordered no subsidy recovery have requested that we reverse the finding of a technical violation; we hold that they have no standing to challenge a pronouncement from which no tangible injury flows.

I

Since the facts underlying this litigation have been adequately recounted in two prior circuit opinions, *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir.), *cert. denied*, 434 U.S. 820 (1977), and *Safir v. Gibson*, 417 F.2d 972 (2d Cir. 1969), *cert. denied*, 400 U.S. 850 (1970), we will only sketch them here; but even a sketch of this protracted controversy can hardly be brief. Section 810 of the Merchant Marine Act, 46 U.S.C. § 1227 (1976), allows any person injured in his business or property by illegal com-

petitive agreements among shippers to recover treble damages from carriers guilty of such practices.[1] It also provides that no carrier engaging in such practices shall receive any government subsidies. Safir's shipping company was bankrupted, in part as a result of predatory pricing by a group of carriers collectively known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO). He settled his treble damages claim with the carriers for about $2.5 million; he has been attempting to compel the United States to withhold all future subsidies to the carriers, and to recover all subsidies paid since the predatory pricing started.

After Safir's requests that the Maritime Administration take such action were rejected without satisfactory explanation, he filed an action in the Eastern District of New York to compel it. That court dismissed the case for

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[1] The Section provides that:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

failure to state a claim. *Safir v. Gulick*, 297 F. Supp. 630 (E.D.N.Y. 1969). The Second Circuit Court of Appeals reversed, holding that the complaint did state a claim, that Safir had standing to bring the suit, and that the Maritime Administration could not decline to recapture past subsidies that were legally recoverable without making a considered decision to adopt that course. The court's reasoning with regard to standing, which we need neither endorse nor reject here, was that recovery of the subsidies would benefit Safir because he was a potential competitor of the AGAFBO lines and therefore stood to gain from impairment of their financial position. *Safir v. Gibson*, *supra*, 417 F.2d 972.

The Maritime Administration held a hearing, after which the hearing examiner recommended that the government recover about $10 million in subsidies paid to the four AGAFBO lines which served the same trade routes as Safir ("the trade lines"). He did not recommend full recovery because of a variety of what he considered mitigating factors. He further found that the three AGAFBO lines which did not serve the same routes as Safir ("the non trade lines") had not participated in setting the rates, had not benefited from Safir's company's demise, and had not violated § 810; he therefore recommended no subsidy recovery from them. *Sapphire Steamship Lines, Inc.*, 3 Maritime Subsidy Bd. Dec. 174 (1972).

The hearing examiner's recommended decision was modified by the Maritime Subsidy Board to reduce the amount of recovery ordered from the trade lines because it considered additional mitigating factors applicable, and because it disagreed with the examiner's views as to the types of subsidies affected by § 810. The Board also held that the non trade lines, although in no way benefiting from the predatory pricing, had "technically violated" § 810 by being members of the conference which had set the predatory rates. In light of the passive nature of their

participation, however, the Board still felt no recovery of subsidies was appropriate. *Investigation of Alleged Section 810 Violation*, 3 Maritime Subsidy Bd. Dec. 128 (1973), *final order on review*, 14 Shipping Reg. Rep. (P & F) 77 (Maritime Subsidy Bd. 1973).

The trade lines then petitioned the Secretary of Commerce to review the Board's decision. The Secretary found that still further mitigation was appropriate, and reduced the total recovery to about $1 million. He affirmed the finding of the non trade lines' "technical violation."

Safir and the carriers appealed from the Secretary's order to the District Court for the District of Columbia, Safir requesting that the Secretary recover all the subsidies, the trade lines requesting that he recover none, and the non trade lines requesting that the finding of technical violation be reversed. *Safir v. Dent*, No. 74-1474 (D.D.C. Oct. 21, 1975); *American Export Lines, Inc. v. Dent*, No. 74-1788 (D.D.C. Oct. 21, 1975); *American President Lines, Ltd. v. Dent*, No. 75-0077 (D.D.C. Oct. 21, 1975). With those appeals, this circuit's involvement in the litigation commenced.

The District Court for the District of Columbia initially dismissed Safir's claim on summary judgment. It did not rule specifically on the trade lines' contention that Safir lacked standing. It stayed the carriers' action for review pending appeal of Safir's claim. No. 74-1474 (D.D.C. Oct. 21, 1975). Safir appealed, and this court, after finding that he had standing, reversed the summary judgment and remanded the case to the district court. *Safir v. Kreps*, *supra*, 551 F.2d 447. On remand, the district court decided both Safir's and the carriers' claims. It upheld the Secretary's determination that the non trade lines had technically violated § 810, but struck down most of the Secretary's order, finding that the reasons for mitigating the subsidy recoveries from the trade lines were not supported by substantial evidence on the

record as a whole. Instead, the court adopted the hearing examiner's recommended decision ordering the $10 million recovery. *Safir v. Klutznick*, 526 F. Supp. 921 (D.D.C. 1981). The trade lines then moved for relief from the judgment under Federal Rule of Civil Procedure 60(b) on the ground that Safir lacked standing. The court denied that motion. Both Safir and the carriers have again appealed.

II

We deal first with Safir's appeal. We do not reach the merits, because we have concluded that Safir has no standing to pursue his claim and we therefore have no jurisdiction to entertain it.

It is now well established that the doctrine of standing is designed not merely to serve the convenience of the courts by assuring adversarial presentation of the issues to be decided, *see Flast v. Cohen*, 392 U.S. 83, 98-101 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962), but is a constitutional limitation upon the jurisdiction of the courts importantly related to the doctrine of separation of powers. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473-74 (1982); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, even Congress itself may not confer standing to sue where the case and controversy requirements of Article III of the Constitution are not met. *Valley Forge, supra*, 454 U.S. at 474-75; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-39 (1976). One of the irreducible Article III minima is that the plaintiff's alleged injury must be likely to be redressed if the requested relief is granted. *Eastern Kentucky, supra*, 426 U.S. at 38.

The injury which this plaintiff has alleged at all stages of this litigation is the impairment of his relative competitive position in the shipping business produced by the government's refusal to impose upon the violators of § 810

the added cost of forgoing and returning government subsidies. As we acknowledged in our 1977 decision, however, "Safir must continue to be a potential competitor of the shipping lines which illegally took the subsidies if he is to benefit from a decision to recover such subsidies." *Safir v. Krepe*, *supra*, 551 F.2d at 451. Safir has consistently asserted a "desire" to reenter the shipping business. *See, e.g.*, Brief for Marshall P. Safir as Appellee at 1, Nos. 81-2394, 81-2395, 81-2396, 82-1008 (D.C. Cir. filed May 24, 1982); Reply of Marshall Safir to Defendants' Responses to His Motion for Summary Judgment & Defendants' Cross Motions at 5, No. 74-1474 (D.D.C. filed June 11, 1975). That desire may well have been potentially achievable in 1969, when the Second Circuit found the following:

> Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by § 810, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the protection of § 810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.

Safir v. Gibson, *supra*, 417 F.2d at 978. It may even have been a plausible hope six years ago, when we said that "appellees and intervenors . . . have pointed to no change in circumstances which would cause us to question the [above quoted] conclusion of the Second Circuit." *Safir v. Krepe*, *supra*, 551 F.2d at 451. It is now, however, unquestionably clear that Safir is not likely to be a competitor to the AGAFBO companies.

To continue to believe the contrary would be not only to ignore the accumulating evidence of the past 16 years in which Safir's only known participation in the shipping business has been his *pro se* prosecution of this litigation. It would also require us to disregard his statement at oral argument of this case that even if the government were

ordered to recover all the subsidies at issue, he still would not reenter the shipping business, but would need a court order requiring that the subsidy monies be paid into a "common fund" which would then be distributed to him and, perhaps, to other shippers injured by the predatory pricing; and that it is this money, and only this money, which he will invest in cargo transportation. Yet Safir has not requested this "common fund" recovery in the present litigation, and has cited no authority that would permit the disbursement of Treasury funds in this fashion. Without finding it necessary to rule on this novel approach to the use of the public fisc, we are confident in saying that at least it is not likely this money, if recovered by the government, will find its way into the plaintiff's hands.

In sum, Safir can no longer realistically be considered to be what we have said he must be in order to maintain this litigation: a "potential competitor." *Safir v. Kreps*, *supra*, 551 F.2d at 451. Given his record of nonparticipation in the shipping business, and his statements described above, the likelihood of his benefiting from the order which he seeks is a good deal less than the likelihood of indigents' benefiting from the Internal Revenue Service's revocation of tax exemptions for hospitals that refuse to provide free service to indigents—which the Supreme Court found inadequate to sustain standing in *Eastern Kentucky*, *supra*. Likewise this court has denied standing to plaintiffs whose claims that they would benefit from the remedies they requested were considerably stronger than Safir's. *See Physicians' Education Network, Inc. v. Department of Health, Education & Welfare*, 653 F.2d 621 (D.C. Cir. 1981); *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978); *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708 (D.C. Cir. 1977). In all of these cases, we found that the constitutional requirement of standing was not met because the prospect that the remedy sought would produce tangible benefit to the plaintiffs

was speculation. It is at least as speculative here, where this plaintiff has told us he will be competing against the shipping companies, weakened through the disgorgement of subsidies which he seeks, only on the occurrence of an eventuality that we have no reason to believe will come to pass.

The relief Safir seeks may benefit him, of course, psychically, providing him the satisfaction of seeing his adversaries stung yet again for their misdeeds against him; and the mere threat of the requested relief may benefit him economically, should the shipping lines conclude that they would be better off to purchase the resignation of this "private attorney general" than to continue the litigation. (Safir has suggested that he would be amenable to such an arrangement.[2]) But the former is not the sort of benefit from which Article III standing is constructed, and the latter not even the sort that a decent system of law should tolerate.

The action we take today does not disregard the doctrine of law of the case, pursuant to which legal and factual determinations once made are generally binding in sub-

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[2] *See, e.g.*, Memorandum of Points and Authorities of Marshall P. Safir in Support of His Motion for Summary Judgment at 14:

> *The leverage which the threat of total recovery would have generated if vigorously asserted by an impartial Secretary/administrator would have been sufficient to force an accomodation [sic] with plaintiffs [sic] competitors for his reentry—following which discretion in mitigation would have been an acceptable solution.*
>
> *The Department of Commerce, instead, acted to defeat the victim it was under mandate to assist, by removing this leverage (and the chance thereby to profit) by a token settlement with the violators in lieu of prosecution.*

No. 82-1064, Plaintiff's Appendix at 172 (filed Mar. 29, 1982) (emphasis in original).

sequent proceedings in the same case.[8] It is true that we found Safir to have standing in *Safir v. Kreps*, *supra*, 551 F.2d 447, but that was only a determination that he had standing *at that time*. Standing, since it goes to the very power of the court to act, must exist at all stages of the proceeding, and not merely when the action is initiated or during an initial appeal. *See DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973). A case involving a standing issue similar to that here was *Golden v. Zwickler*, 394 U.S. 103 (1969), where the plaintiff sought a declaratory judgment invalidating a New York law prohibiting distribution of anonymous literature in election campaigns. At the time suit was brought, the candidate against whom plaintiff's anonymous handbill had been directed was in Congress and, it was alleged, would be a candidate for reelection, at which time plaintiff would seek to distribute the same handbill. However, by the time of remand to the district court after an initial Supreme Court appeal, the congressman had accepted a judicial appointment and was thus (in the Supreme Court's view) "most unlikely" to run for Congress again. *Id.* at 109. The Supreme Court held, in the second appeal, that it was error for the district court, on the remand, to decide the issue of whether a case or controversy existed on the basis of the facts when the action was commenced. Rather, it should have determined whether the facts existing at the time of the hearing on remand established the "immediacy and reality" necessary

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[8] Application of the doctrine is in any event discretionary, *see Messenger v. Anderson*, 225 U.S. 436, 444 (1912), and there are a number of recognized grounds for declining to invoke it that would embrace the present case. The doctrine does not preclude courts from reexamining issues that go to their constitutional power over the case, *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry.*, 520 F.2d 91, 95 & n.22 (D.C. Cir. 1975), or issues affected by newly discovered facts, *see Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.), *cert. denied*, 429 U.S. 828 (1976).

to constitute an actual controversy. *Id.* So also here, we must evaluate compliance with the Article III requirements on the basis of the facts as they exist at the present time.

It is irrelevant, therefore, whether we were correct in our determination in 1977 that the plaintiff's hope of reentering the shipping business was, at that time, a hope joined with a reasonably achievable intent. We neither reexamine nor contradict that determination here.[4] What we do find, however, is that in light of six more years of ineffectual hoping, and of Safir's own current acknowledgment that it is not merely the government's failure to drain the economic resources of his would-be competitors which stays his entrepreneurial hand, there is no longer anything more than a speculation (if even that remains) that the relief sought in this case will benefit the plaintiff. The courts therefore have no jurisdiction to entertain his complaint.

III

This leaves two further issues to be resolved. The first of these is presented by the "trade line" carriers' appeal, the second by that of the "non trade line" carriers.

The trade line carriers have requested us to set aside the Secretary's decision ordering them to repay approximately $1 million in subsidies paid them during the violation period. They contend that § 810 does not permit

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[4] Much less do we question the correctness of the Second Circuit's determination of standing in *Safir v. Gibson*, *supra*, 417 F.2d 972. Just as the doctrine of law of the case does not make our 1977 determination relevant to the issue of present standing, so also the doctrine of collateral estoppel does not make that 1969 determination relevant. *See United States v. Crow Dog*, 532 F.2d 1182, 1188 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977) (transfer of indictment for trial did not preclude subsequent denial of motion to transfer superseding indictment since the only issue determined by the prior order was that a fair trial in the District of South Dakota could not be had at that time on that indictment).

recovery of any subsidies paid to a shipper before administrative determination that it has engaged in an "unjustly discriminatory or unfair practice."

This contention is at odds with a prior holding of the Second Circuit in *Safir v. Gibson*, *supra*, 417 F.2d 972, which collaterally estops the trade lines from relitigating the issue. In *Gibson*, the Second Circuit stated:

> We think [the statute's] concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the Administrator may be less absolute than is the obligation to cease payments to current violators. *In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made.* Recovery of such payments poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him. *Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit this under the subsidy contract in the absence of a statutory prohibition, and we find no such prohibition here.*

Id. at 977 (footnote omitted, emphasis added). The trade lines argue that this passage is not incompatible with their position, since by "subsidies improperly paid in the past," the court may have meant subsidies paid after determination of violation. But that is utterly irreconcilable with the court's reason for implying the remedy: "In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made." *Id.*

The trade lines further argue that the Second Circuit's statement was mere dictum and hence does not trigger application of collateral estoppel, *see Association of Bi-*

tuminous Contractors, Inc. v. Andrus, 581 F.2d 853, 860 (D.C. Cir. 1978), since it was made in the course of discussing Safir's standing rather than the merits of the case. If the dismissal by the Eastern District of New York had been based solely on lack of standing, and if the Second Circuit had done no more than reverse that, it would be possible to assert (although the language does not readily bear this interpretation) that the decision did not "go[] to the merits," *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970), but only established that Safir's grievance was arguable. In fact, however, what was on appeal was a dismissal for failure to state a claim. In reversing it, the Second Circuit remanded with instructions to proceed in accordance with its opinion which stated, among other things, that Safir was entitled to a "considered decision [by the Maritime Administrator] whether to recover the subsidies." *Safir v. Gibson*, *supra*, 417 F.2d at 978. Such a decision would have been unnecessary (and Safir's complaint would properly have been dismissed for failure to state a claim) unless the Administrator had legal authority to invoke that sanction. It might be argued (though the trade lines have not done so) that the statement was dictum at least to the extent that its application went beyond subsidies paid after determination of violation, since only the latter would have been necessary to defeat the motion to dismiss. We might credit such an argument if we were confident that at least some post-determination payments had been alleged. We are not. (Counsel for the lines stated at oral argument that the record in the present case does not reveal whether any post-determination payments had been made at the time of the Second Circuit's decision.) As pointed out in connection with our discussion of the proper interpretation of the Second Circuit's statement, extension to pre-determination payments was an essential element of its justification. We are not prepared to draw the line between dictum and holding at a point that both produces

a holding devoid of its expressed justification and assumes a state of the record that may not have existed.

The trade lines' final argument, not made in their brief but mentioned at oral argument, is that they did not participate in the Second Circuit proceedings, as application of collateral estoppel would ordinarily require. *See Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 590 F.2d 1209, 1217 (D.C. Cir. 1978), *rev'd on other grounds sub nom. GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980). We find that their participation was sufficient to invoke the doctrine.

The parties to the case in which the Second Circuit's 1969 *Safir v. Gibson* decision was rendered were Safir, his brother-in-law, their shipping company, and various government officials. The AGAFBO lines did not participate. The Second Circuit expressed concern that its opinion might "'as a practical matter impair or impede' their ability to protect their interests." 417 F.2d at 976 n.4, *quoting* Fed. R. Civ. P. 19(a). The court accordingly directed the district court on remand not to feel that anything in its opinion precluded it from considering any new arguments made by the AGAFBO lines should they intervene or be joined as defendants. *Id.* This, however, they "sedulously abstain[ed]" from doing until matters had proceeded considerably further. *Safir v. Gibson*, 432 F.2d 137, 145 (2d Cir.) (on petition for rehearing), *cert. denied sub nom. American Export Isbrandtsen Lines, Inc. v. Safir*, 400 U.S. 942 (1970). In the interim, in accordance with the Second Circuit's original decision, the Maritime Administration had started a proceeding to determine whether the government should recover subsidies from the AGAFBO lines, and if so, in what amounts. One of the questions the Administration announced it would consider was whether the lines had violated § 810. Safir, however, believing that issue was foreclosed by a prior Federal Maritime Commission finding, requested the Dis-

trict Court for the Eastern District of New York to issue an injunction preventing a second hearing on the point. The district court declined to do so, but the Second Circuit reversed. Only at that point did the trade lines petition for leave to intervene to seek rehearing, and on only that issue. Leave was granted, the lines were permitted to file briefs, and the motion for rehearing was denied. 432 F.2d at 145-46. It thus appears that the trade lines had full opportunity to argue the issue under discussion here, first when they were in effect invited by the Second Circuit to intervene in the original proceeding, and in all probability (given the court's expressed concern about prejudicing them) when they finally did intervene in a closely related proceeding before the same court a year later; the issue was argued by another party, the Maritime Administration, and decided by the court; and administrative and judicial proceedings involving the trade lines for the past 13 years have relied on the court's ruling. This is enough in law and reason to work a collateral estoppel. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968); *Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 505 (1968); *Defenders of Wildlife v. Andrus*, 77 F.R.D. 448, 452 (D.D.C. 1978).

IV

The final issue in this case is that raised by the non trade lines, which appeal from the finding in the Secretary's order that they technically violated § 810 by remaining members of the AGAFBO conference. In the circumstances of this case, we conclude that there is no standing to challenge this determination. The Secretary is not charged by law with opining regarding violations of the Act, but rather with acting to prevent and punish them. He has taken no such action with regard to the non trade lines, and his estimation of a technical violation could be considered, technically, dictum. His pronouncement has not even had the effect of casting moral

blame upon the affected lines, since the asserted violation is qualified by the term "technical."

In these circumstances, we cannot find that the non trade lines have suffered that concrete, tangible injury necessary to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972). This conclusion not only accurately reflects the law, but it also accurately reflects the estimation of the parties. Counsel for the non trade lines acknowledged in oral argument that the lines were intent on pressing this point only to guard against the risk that Safir might induce the courts to attach some consequences to the otherwise innocuous determination of technical violation. Since, as we have found, Safir has no power to do so, the risk is non-existent and so is the injury accruing from the Secretary's determination. We therefore need not (and indeed cannot) resolve in this case an issue that could be of great consequence elsewhere if and when a similar alleged technical violation is actually enjoined or punished.

V

We have concluded as a result of our deliberations that Safir and one group of the AGAFBO appellants (the non trade lines) have no standing, and that we therefore have no jurisdiction to entertain their complaints. With regard to the appeal of the trade line appellants, we have determined that the district court properly denied the relief requested by reason of the doctrine of collateral estoppel.

Where an appellate court finds that jurisdiction does not exist—even when, as we may assume to be the case with regard to Safir, jurisdiction first terminates during the pendency of the appeal—"[t]he established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). Since the district

court's proper disposition of the trade lines' complaint is bound up in the same judgment applicable to all the consolidated cases, we vacate that judgment in its entirety, and remand with direction to dismiss the complaints of Safir and the non trade lines for lack of jurisdiction, and to dismiss the complaint of the trade lines on the merits.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1798 September Term, 1983

Marshall P. Safir Civil Action No. 83-00688
Appellant

FILED Jan. 10, 1984

v.

Elizabeth H. Dole, Secretary
Department of Transportation, et. al.

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalid and Starr Circuit Judges; and McGowan, Senior Circuit Judge

O R D E R

The Suggestion for Rehearing en banc of Appellant, Marshall P. Safir, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestionis denied.

Per Curiam
For The Court

George A. Fisher, Clerk

BY:

Daniel M. Cathey
First Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1798 September Term, 1983

Marshall P. Safir Civil Action No. 83-00688
Appellant

FILED Jan. 10, 1984

v.

Elizabeth H. Dole, Secretary
Department of Transportation, et. al.

O R D E R

On consideration of the Petition for Rehearing of appelant Marshall P. Safir, filed December 12, 1983, it is

ORDERED by the Corut that the aforesaid Petition is denied.

Per Curiam
For the Court
GEORGE A. FISHER, CLERK
BY:

Daniel M. Cathey
First Deputy Clerk

Circuit Judge Mikva did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2271

September Term, 1983

Marshall P. Safir
Appellant

Civil Action No. 74-01474

FILED Nov. 4, 1983

v.

Elizabeth Hansford Dole,
Secretary of Transportation,
et. al.

And Consolidated Case Nos.
81-2389, 81-2393,81-2395,
81-2394, 81-2396, 82-1006

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

The Suggestion for Rehearing en banc of Marshall P. Safir, pro se, filed October 21, 1983, has been circulated to the full Court and no member has requested the taking of a vote theron. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Mikva and Bord did not participate in this Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2271 September Term, 1983

Marshall P. Safir
Appellant

Civil Action No. 74-01474

FILED Nov. 4, 1983

v.

Elizabeth Hansford Dole,
Secretary of Transportation,
et. al.

And Consolidated Case Nos.
81-2389, 81-2393, 81-2395,
81-2394, 81-2396, 82-1006

BEFORE: Wright and Scalia, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of Marshall P. Safir, pro se, filed October 21, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER

By:
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	
LYKES BROS. STEAMSHIP COMPANY, INC.	)	Case No. 83-00289
	)	
	)	Filed Dec. 7, 1983
DEBTOR	)	
	)	

ORDER AND JUDGMENT

Upon consideration of this Court's Order dated July 18, 1983 which granted the Motion to Dismiss or Alternatively for Summary Judgment of Lykes Bros. Steamship Co., Inc., ("Lykes"), ordered that the involuntary petition of Marshall P. Safir ("Safir") be dismissed with prejudice, and ordered costs and attorneys fees be awarded to Lykes from Safir, and upon the application of Lykes for judgment for costs and attorneys' fees, and the motion of Lykes for leave to file amended application for judgment of costs and attorneys' fees, and the supporting documents thereto, and upon consideration of the record in this case as a whole, it appearing that the application for costs

and fees is well founded; it is by the Court this 7th day of December, 1983,

ORDERED: That judgment be, and hereby is, granted to debtor Lykes Bros. Steamship Co., Inc. against petitioner Marshall P. Safir for attorneys' fees in the amount of $21,786,77 and costs in the amount of $1,900.00, for a total sum of 23,686.77.

ROGER M. WHELAN
U.S. BANKRUPTCY JUDGE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1798 September Term, 1983

Marshall P. Safir Civil Action No. 83-00688
Appellant

FILED Nov. 28, 1983

v.

Elizabeth H. Dole, Secretary
Department of Transportation, et. al.

Before: Wiley and Mikva*, Circuit Judges
McGowan, Senior Circuit Judge

O R D E R

Upon consideration of appellee Dole's motion to dismiss the appeal or in the alternative for summary affirmance, and of the responses thereto, it is

ORDERED by the Court that the motion for summary affirmance is granted. Walker v. Washington, F-2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). Appellant does not have standing to challenge the Secretary's action. See Valley Forge Christian

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*Circuit Judge Mikva did not participate in this order.

College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982); Safir v. Dole, No. 81-2271, slip op. at 8-13 (D.C. Cir. Sept. 30, 1983). It is

FURTHER ORDERED by the Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on June 15, 1982.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1798 September Term, 1983

Marshall P. Safir
Appellant

Civil Action No. 83-00688

FILED Nov. 15, 1983

v.

Elizabeth H. Dole, Secretary
Department of Transportation, et. al.

Before: Wright, Edwards*, and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion for summary reversal, and of the oppositions and reply thereto, it is

ORDERED by the Court that the motion is denied. Appellant has failed to "demonstrate that the merits of his claim are so clear as to justify expedited action." Ambach v. Bell, 686 F.2d 974,979 (D.C. Cir. 1982) (per curiam) (quoting Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980)).

Per Curiam

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*Circuit Judge Edwards did not participate in this order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARSHALL P. SAFIR,	:	
	:	
Plaintiff	:	
	:	
v.	:	C.A. Nos. 74-1474
	:	74-1788
PHILLIP M. KLUTZNICK,	:	75-0077
Secretary of Commerce,	:	
et al.,	:	
	:	
and	:	
	:	
UNITED STATES LINES,	:	
INC., et al.,	:	
	:	
Intevening Defendants.	:	

ORDER

Pursuant to the order of the United States Court of Appeals for the District of Columbia Circuit on September 30, 1983, it is hereby

ORDERED that the complaints in C.A. No. 74-1474 and C.A. No. 75-0077 be dismissed for lack of jurisdiction; and further

ORDERED that the complaint in C.A. No. 74-1788 be dismissed on the merits.

UNITED STATES DISTRICT JUDGE

Date: January 13, 1984

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 26, 1984

Mr. Marshall P. Safir
271 Grand Center Parkway
Floral Park, New York 11005

RE: Marshall P. Safir v. Elizabeth Hansford Dole, Secretary of Transportation, et al.
A-583

Dear Mr. Safir:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case, has been presented to the Chief Justice, who on January 25, 1984, signed an order extending your time to and including April 2, 1984.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Katherine Downs
Assistant Clerk

gtb
Enc.
cc(letter only): Hon. Rex E. Lee, Solicitor General
Clerk, U. S. Court of Appeals for the D. C. Circuit (your Nos. 81-2271, 2389, 2394

A31

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1064 | September Term, 1983

Marshall P. Safir
Appellant | Civil Action No. 74-01474

FILED Oct. 5, 1983

v.

Elizabeth Hansford Dole,
Secretary of Transportation,
et. al.

Before: Wright and Scalia, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by the parties. In the instant appeal this Court is asked to overrule a District Court order issued in connection with appellant's suit against the Secretary of Transporation and various shipping lines. In as much as the Court held on September 30, 1983, in Appeal Nos. 81-2271, et al., Marshall P. Safir v. Elizabeth Hanford Dole, that appellant has no standing to press the underlying claim, he likewise has no

standing to engage in discovery. In view of the foregoing, it is

ORDERED, by this Court, that the instant appeal is dismissed. It is further

ORDERED, by this Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam
For the Court

George A. Fisher
Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Filed July 18, 1983

In re	x	
	x	
LYKES BROS. STEAMSHIP	x	Chapter 7
COMPANY, INC.	x	Case No. 83-00289
	x	
Debtor.	x	

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER
DISMISSING INVOLUNTARY PETITION WITH PREJUDICE
AND AWARDING COSTS AND ATTORNEYS' FEES TO DEBTOR

Upon the Involuntary Petition filed herein on May 6, 1983, by Marshall P. Safir and upon Motion to Dismiss or Alternatively, for Summary Judgment by alleged debtor Lykes Bros. Steamship Companyu, Inc., and the Affidavit, Exhibits, and Brief in Support of such Motion, and Petitioner's Brief in Opposition thereto, the matter having come on for a hearing before this Court on July 7, 1983, and argument by both parties having been heard, and the Court having rendered its oral opinion, the court hereby finds, concludes and orders as follows:

FINDINGS OF FACT

1. Petitioner Safir is not a creditor of the debtor or a holder of a claim against the debtor wihin

the meaning of the bankruptcy laws. Petitioner's alleged claim results from litigation instituted by him for judicial review of orders of the Secretary of Commerce requiring debtor to refund certain merchant marine subsidies to the United States. In such litigation a judgment of the United States District Court for the District of Columbia has been entered requiring the Secretary to redetermine the amount of such refunds to the United States, and petitioner and debtor have both appealed such order. Such appeals are pending. Any liability that may exist on the part of debtor as a result of such litigation will be liability to the United States and not to petitioner. Any claim that petitioner may have to any payment resulting from such litigation will be a claim against the United States, not against debtor. Any claim petitioner may have against the United States (or debtor) at this time depends on judicial determination of disputed and uncertain issues of law and fact and is contingent at most, not only as to amount but as to liability, i.e., the fact of the claim itself.

2. There are more than twelve (12) creditors of

this debtor who are not employees or insiders of debtor and are not transferees of a voidable transfer.

3. The debtor has shown by affidavit and exhibits that it is generally paying its debts as they come due and there is nothing to indicate that debtor is generally not paying its debts as they come due. No creditor has sought to join in the petition. In the circumstances of this case, no purpose would be served by a general notice to creditors of the debtor prior to dismissing the petition.

4. The domicile, principal place of business, and principal assets of debtor are outside this district and have been outside this district continuously for more than 180 days prior to the filing of the petition.

5. There has been no consent to dismissal and debtor has not waived the right to judgment under subsection 303(i) of the Bankruptcy Code.

CONCLUSION OF LAW

1. Petitioner is not the holder of a claim against debtor. To the extend that petitioner may hold a claim against anyone, such claim is not contingent as to liability within the meaning of

sections 101(4) and 303(b) of the Bankruptcy Code.

2. Debtor has more than twelve (12) holders of a claim against it, excluding any employee or insider of the debtor and any transferee of a transfer that is voidable under the Bankruptcy Code.

3. Debtor is entitled to judgment against petitioner for costs and reasonable attorney's fee.

ORDER

Upon such opinion, findings, and conclusions it is this 18th day of July 1983.

ORDERED that debtors's Motion to Dismiss, or Alternatively for Summary Judgment, be and it hereby is granted; and it is further

ORDERED that the Involuntary Petition herein be and it hereby is dismissed with prejudice; and it is further

ORDERED that costs and attorneys' fees in an amount to be determined by the Court shall be awarded to debtor from petitioner.

Debtor shall submit an appropriate application on or before July 25, 1983.

United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARSHALL P. SAFIR,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 83-0688
v.	)	
ELIZABETH H. DOLE, Sec. of Transportation,	)	Filed July 12, 1983
	)	
Defendant,	)	
	)	
LYKES BROS. STEAMSHIP CO., INC.	)	
	)	
Intervenor.	)	

ORDER

This matter is before the Court on Plaintiff's motion for preliminary injunction and defendants' motions to dismiss, with oppositions hereto. Oral argument on these motions was heard July 6, 1983. At oral argument plaintiff acknowledged on the record that the only issue presented at this state is whether or not he is a "judgment creditor" of Lykes Bros. Steamship Co., Inc., (Lykes) or Moore McCormack Lines, Inc. (Moore McCormack), such that he has standing to challenge the approval by Secretary of Transportation Dole (Secretary of the sales of the capital stock of those shipping companies.

Plaintiff volunteered that a ruling against him on this issue would moot his motion for preliminary injunction. Since it is determined that plaintiff is not a "judgment creditor," even if that term of art is liberally construed, and thus lacks standing to maintain this action, defendants' motions to dismiss shall be granted and plaintiff's motion for preliminary injunction shall be denied as moot.

For approximately 15 years plaintiff, who is pro se, has been litigating his alleged right to recover operating—differential—subsidies paid by the Government to certain shipping companies which violated Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. Sec. 1171-83 (1976) in 1965 and 1966. Section 810, 46 U.S.C. Sec. 1227, prohibits subsidy contractors from engaging in practices in concert which are unjustly discriminatory or unfair to other American ship operators, and forbids the payment of subsidies to violators. Section 810 separately provides that any person injured by reason of such practice may sue for treble damages.

This lawsuit arises out of litigation now pending in the court of appeals for the District of Columbia

Circuit (D.C. Cir. No. 81-2271, argued Oct. 29, 1982). The relevant preceding events may be summarized as follows:

Mr. Safir was the principal stockholder of the now defunct Sapphire Steamship Lines, Inc. (Sapphire). In 1865 and 1966 several steamship lines, including Lykes and Moore McCormack, engaged in unfair rate competition with Sapphire. Safir and Sapphire then demanded that the Maritime Administration, which at that time administered subsidy contracts between the government and American-flag steamship lines for the operation of foreign commerce, cease paying subsidies to those contractors, as provided by Section 810.

Sapphire brought an action for treble damages which was finally settled in 1974. In addition, Safir, his partner and Sapphire instituted an action in the District Court for the Eastern District of New York against the Maritime Administrator, the Secretary of the Subsidy Board and the Secretary of Commerce, seeking a declaration that Section 810 barred subsidy payments to the violators, and an order compelling defendants to stop such payments and to recover the

subsidies. The District Court dismissed the complaint for failure to state a claim on which relief could be granted.

On appeal, the action was remanded to the Maritime Administrator for a reasoned determination of whether to recover subsidies paid during the period of unlawful competition. Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969); Safir v. Gibson, 432 F.2d 137 (2d Cir.) cert. denied, 400 U.S. 850 (1970)

The Maritime Administration ordered certain subsidized lines to refund part of the subsidies to the government. The Secretary of Commerce affirmed this order but mitigated the amount of the refund required. Investigation of Alleged Section 810 Violation, 3 Mar. Sub. Bd. Rep. 128 (1973), final order on recoveries, 14 Ship. Reg. Rep. (P&F) 77 (1973). In its decision the Maritime Administration rejected Safir's argument that the refunds should be paid to him as the victim of the unlawful competition. Section 810 "is concerned with government funds... and therefore concerns the recovery of the government's payments. No authority is cited for paying over such government payments,

which are recovered to a private person or corporation... Mr. Safir's [treble damages] remedy is provide separately." 3 Mar. Sub. Bd. Rep. at 172.

Thereafter, Safir brought an action in the District Court for the District of Columbia against the Secretary of Commerce to set aside the refund order on the basis that Section 810 requires that all of the subsidies paid during the period of violation be refunded to the government. The District Court granted summary judgment in favor of defendant and intervenors but the Court of Appeals reversed and remanded the action to the District Court. Safir v. Kreps, 551 F.2d 447 (D.C. Cir.), cert. denied, 434 U.S. 810 (1977).

The Court of Appeals held that the District Court must review the Secretary's decision not to seek recovery of all subsidies paid to determine whether the Secretary acted arbitrarily or capriciously or abused his discretion. However, the Court of Appeals also held that plaintiffs could not relitigate matters actually decided by the Second Circuit in the Safir v. Gibson cases, including plaintiffs' contention that the Secretary had no discretion to do other than seek

recovery of all susidies paid to violators, which the Second Circuit had specifically rejected. 551 F.2d at 453-54.

Subsequently, the District Court found the Secretary's order arbitrary and capricious in some respects and remanded the case to the Secretary of Transportation. [1] Safir v. Klutznick, 526 F.-Supp. 921 (D.D.C. 1981). The consolidated appeals by the subsidized lines and by Safir, are now pending. Meanwhile, the Secretary, acting on the remand order, directed the refund of various sums subject to modification based on the decision of the court of Appeals.

In this action, plaintiff contends, essentially, that the Lykes and Moore McCormack stock transfers were motivated by fear of an adverse decision in the Court of Appeals. Permitting the transfers will effectively deplete the "common fund" in which plaintiff believes he is entitled to share. Plaintiff has attempted to enjoin the financial transactions of

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[1] By the Maritime Act of 1981, Pub. L. 97-31, 95 Stat 151, the Maritime Administration was transferred to the Department of Transportation.

subsidized lines on the same theory, without success, on several occasions during this protacted litigation. See Intervening Defendant's Points and Authorities in Opposition to Plaintiff's Motion to Add Defendants, May 11, 1983, at 9-14.

As stated above, plaintiff's standing to repeat this time-worn argument here depends on whether or not he is a "judgment creditor." Plaintiff claims that Safir v. Klutznick, 526 F.Supp. 921 (D.D.C. 1981), accords him that status. Yet, that decision does not entitle plaintiff to any monetary recovery. Plaintiff supposes that because he had standing in the earlier proceedings based on his competitive interest in having the government recover subsidy payments, he should be treated as if he were actually entitled to the "gargantuan" sums he foresees in order to make that interest tangible. But any "profit" plaintiff may eventually realize must arise from the competitive advantage he will enjoy over other shipping companies ordered to refund subsidies, should he reenter the shipping business, and not from any direct restitution of his initial losses. See Safir v. Kreps, 551 F.2d at 451; Safir v. American Export Lines, No. 77 C 1093,

slip. op. at 12 (E.D.N.Y. Dec. 20, 1977). The prospect of such profit does not confer standing on plaintiff to challenge the Secretary's approval of the financial transactions of his former competitors in this case any more than it has on prior occasions.

Before he can invoke the judicial power plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian College v. American United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Plaintiff suffers no legal injury from the Secretary's approval of the transactions unless he is an actual creditor of one of the shipping companies involved. Being a metaphorical or hypothetical creditor will not suffice. Therefore, for the purposes of determining plaintiff's standing in this action, whether or not the government ultimately is able to collect the fully amount of the subsidy refund ordered by the Court of Appeals is irrelevant.

It is, by the Court, this 12th day of July, 1983

ORDERED, that defendants' motions to dismiss shall be and they hereby are granted; and it is

further

ORDERED that this cause stands dismissed for lack of subject matter jurisdiction.

JOYCE HENS GREEN

98TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
98-600

SHIPPING ACT OF 1984

FEBRUARY 23, 1984.—Ordered to be printed

Mr. JONES of North Carolina, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 47]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 47) to improve the international ocean commerce transportation system of the United States, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Shipping Act of 1984".

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 2/23/84

(B) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

(2) No common carrier may pay compensation for services described in paragraph (1) more than once on the same shipment.

(3) No compensation may be paid to an ocean freight forwarder except in accordance with the tariff requirements of this Act.

(4) No ocean freight forwarder may receive compensation from a common carrier with respect to a shipment in which the forwarder has a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on that shipment.

SEC. 20. REPEALS AND CONFORMING AMENDMENTS.

(a) REPEALS.—The laws specified in the following table are repealed:

Shipping Act, 1916:	
Sec. 13	*39 Stat. 732.*
Sec. 14a	*46 App. U.S.C. 813.*
Sec. 14b	*46 App. U.S.C. 813a.*
Sec. 18(b)	*46 App. U.S.C. 817(b).*
Sec. 18(c)	*46 App. U.S.C. 817(c).*
Sec. 26	*46 App. U.S.C. 825.*
Sec. 44	*46 App. U.S.C. 841b.*
Merchant Marine Act, 1920:	
Sec. 20	*41 Stat. 994.*
Merchant Marine Act, 1936:	
Sec. 211(a)	*46 App. U.S.C. 1111(a).*
Sec. 214	*46 App. U.S.C. 1114, wherever that section applies to the Federal Maritime Commission (Commission), any member of the Commission or any member, officer or employee designated by the Commission.*
Omnibus Budget Reconciliation Act of 1981:	
Sec. 1032	*95 Stat. 770*

(e) SAVINGS PROVISIONS.—

(2) This Act and the amendments made by it shall not affect any suit—

(A) filed before the date of enactment of this Act; or

(B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within one year after the date of enactment of this Act.

Reagan Praises Ship Reform

Calls Maritime Law 'Most Significant' Since 1916 Act

By ROBERT F. MORISON
Journal of Commerce Staff

WASHINGTON — President Reagan Tuesday signed into law legislation to revamp the way this country regulates ocean common carriers in the foreign trades. He called it "the most significant since the original shipping act in 1916."

During a brief, 10 minute signing ceremony in the decorous East Room of the White House before some 200 industry and government officials and members of the House and Senate, the chief executive said the merchant fleet historically has been "vital" and has played a "crucial" role in the nation's well-being.

In recent years however, he said, procedural delays, government intervention, limits on U.S. carriers and concern over antitrust entanglements have made it difficult for this country's operators to compete.

"It is going to be my pleasure to sign a bill to change all that," he said.

He added that there remained "a great deal to be done" on behalf of the merchant fleet, but that his administration was "moving ahead" on various matters. Specifically he mentioned trying to expand civilian manning of Navy support vessels, and "doing all we can" for ship construction through the big Navy building program.

Transportation Secretary Elizabeth Hanford Dole preceded the president to the dais and spoke briefly of the "real start" made by the legislation in "returning our merchant marine to pre-eminence on the world's shipping lanes."

She, too, wasn't more specific, but seemed to look ahead. With the signing of the legislation into law "we should not sustain our efforts.

JOURNAL OF COMMERCE AND COMMERCIAL
NEW YORK, WEDNESDAY, MARCH 21, 1984

Library References

Shipping ⟨⟩34. C.J.S. Shipping §§ 2, 9, 10.

§ 1178. Sale or assignment of contract; consent of Secretary; purchaser subject to terms of contract; rescinding contract on transfer without consent

No contract executed under this subchapter or any interest therein shall be sold, assigned, or transferred, either directly or indirectly, or through any reorganization, merger, or consolidation, nor shall any agreement or arrangement be made by the holder whereby the maintenance, management, or operation of the service, route, line, vessel, or vessels is to be performed by any other person, without the written consent of the Secretary of Commerce. If he consents to such agreement or arrangement, the agreement or arrangement shall make provision whereby the person undertaking such maintenance, management, or operation agrees to be bound by all of the provisions of the contract and of this chapter applicable thereto, and the rules and regulations prescribed pursuant to this chapter. If the holder of any such contract shall voluntarily sell such contract or any interest therein, or make such assignment, transfer, agreement, or arrangement whereby the maintenance, management, or operation of the service, route, line, vessel, or vessels is to be performed by any other person, without the consent of the Secretary, or if the operation of the service, route, line, or vessel, shall pass out of the direct control of the holder of such contract by reason of any voluntary or involuntary receivership or bankruptcy proceedings, the Secretary shall have the right to modify or rescind such contract, without further liability thereon by the United States, and is vested with exclusive jurisdiction to determine the purposes for which any payments made by it under such contract shall be expended.

June 29, 1936, c. 858, §§ 606, 905(e), 49 Stat. 2007; 1950 Reorg.Plan No. 21, §§ 105(1), 206, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1275; July 17, 1952, c. 939, § 21, 66 Stat. 765; 1961 Reorg.Plan No. 7, eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840.

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